

Decision 01-04-038 April 19, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Utility Consumers' Action Network,

Complainant,

vs.

Choctaw Communications, Inc., d/b/a
Smoke Signals Communications,

Defendant.

Case 00-04-039
(Filed April 27, 2000)

O P I N I O N

I. Summary

This decision adopts, with two modifications, an all-party settlement that resolves the complaint filed by Utility Consumers Action Network (UCAN) against Choctaw Communications, Inc., d/b/a Smoke Signal Communications (Choctaw). The first modification is a requirement for Choctaw to file an advice letter to offer measured rate local telephone service (MRS). The advice letter must be filed no later than 30 days after the effective date of this decision. The second modification is a requirement for Choctaw to pay a fine of \$5,000 for its failure to offer MRS as required by Decision (D.) 96-10-066.

II. Background

Choctaw is authorized by D.98-07-028 to provide resold local exchange service. Choctaw's only current offering is prepaid local exchange service.

Choctaw provides its service with “no credit check, no ID, and no deposit.”¹ As a result, many of Choctaw’s customers are persons who are unable or unwilling to obtain service from incumbent local exchange carriers (ILECs) or competitive local carriers offering traditional postpaid service.

To be a successful provider of prepaid service, Choctaw must guard against the possibility that a customer will incur a bill that exceeds the amount of prepayment. This is because Choctaw’s customers often do not pay for service after the fact, since many are credit challenged and/or take service for only a short period of time. To protect itself, Choctaw offers only fixed-rate services that can be fully paid for in advance, i.e., services that provide an unlimited amount of usage for a fixed fee. With one exception, described below, Choctaw does not offer any services that have per-call charges, since such services may enable customers to incur bills that exceed the prepaid amount.

Choctaw provides service by reselling the services offered by the ILECs. The rate structure for the ILECs’ MRS consists of a flat monthly fee plus a per-call charge. The ILECs do not provide MRS in a way that tracks per-call charges in real-time and immediately terminates service when the prepaid amount falls to zero. Consequently, Choctaw does not offer MRS to most of its customers, since MRS usage charges could exceed the amount of prepayment. Rather, Choctaw offers only flat-rate local service to most of its customers. The only customers of Choctaw that have access to MRS are subscribers to Universal Lifeline Telephone

¹ <http://www.smokesignal-clec.com/offer/index.html>.

Service (ULTS).² ULTS includes access MRS pursuant to D.96-10-066, D.00-10-028, and General Order 153.

Given the need to block calls that result in per-call charges, Choctaw submitted with its application for a certificate of public convenience and necessity (CPCN) a draft tariff that included the following text:

The following types of calls and services may be blocked by the Company: long distance; collect calls; operator-assisted calls; third number billed calls; or any service that may be billed to the Customer's telephone number.

In D.98-07-028, the Commission granted Choctaw's application for authority to provide local exchange service.³ The Commission also found in D.98-07-028 that Choctaw's draft tariff complied with all Commission requirements.⁴ Choctaw's initial tariff mirrored its draft tariff.

UCAN filed its complaint on April 27, 2000. In its complaint, UCAN alleged that Choctaw has not provided various types of services required by the Commission, including MRS. Choctaw filed its answer to the complaint on June 15, 2000. In its answer, Choctaw denied UCAN's allegations. With respect to MRS, Choctaw admitted that it does not offer MRS, but denied that it is required to do so by the Commission.

A prehearing conference (PHC) was held on September 15, 2000. Written PHC statements were filed and served by UCAN and Choctaw prior to the PHC.

² Choctaw is required to offer ULTS to qualified low-income households. There is no evidence in the record of this proceeding that Choctaw has any ULTS customers.

³ In D.98-07-028, the Commission granted a CPCN to "Choctaw Communications, L.C." In D.00-01-036, the Commission approved a transaction in which Choctaw changed to its present name (Choctaw Communications, Inc., d/b/a/ Smoke Signal Communications) and became a corporation rather than a limited liability company.

⁴ D.98-07-028, Finding of Fact No. 15.

During the PHC, the parties indicated a desire to settle all issues, and asked assigned Administrative Law Judge (ALJ) Kenney to suspend the proceeding pending settlement negotiations. The assigned ALJ granted the parties' request.

On September 19, 2000, UCAN notified the assigned ALJ by e-mail that the parties had met and resolved all outstanding issues, and would likely submit a settlement agreement by the end of the month. UCAN also stated that there was no need to schedule hearings.

When no settlement was submitted, the assigned ALJ sent an e-mail to UCAN on November 6, 2000, asking for a status report. UCAN responded by e-mail the same day, stating that the parties were in the process of finalizing the settlement, and that the settlement would likely be submitted within two weeks.

Once again, no settlement was submitted. On February 22, 2001, the assigned ALJ issued a ruling that set a deadline of February 28, 2001, for the parties to file either (1) a settlement agreement, or (2) a motion for an extension of the 12-month deadline for concluding complaint proceedings. UCAN and Choctaw filed a settlement agreement on February 28, 2001.

III. The Settlement Agreement

UCAN and Choctaw state that the Settlement Agreement ("Settlement"), attached to this decision as Appendix A, resolves UCAN's complaint and satisfies all existing criteria for adoption by the Commission. Curiously, some of the issues raised in UCAN's complaint and written PHC statement are not addressed by the Settlement,⁵ while one issue appears for the first time in the Settlement. A summary of the Settlement is provided below.

⁵ We assume that any allegation made by UCAN in its complaint or written PHC statement has no merit if the allegation is not addressed by the Settlement.

Measured Rate Service. UCAN alleged that Choctaw has not provided MRS to all of its customers as required by D.96-10-066. Choctaw admitted that its has not provided MRS to all of is customers, but denied that it is required to do so by D.96-10-066. The Settlement insinuates that the requirement to offer MRS may impose an undue hardship on prepaid service providers, and urges the Commission to open a generic investigation into whether and how prepaid providers of local service should comply with D.96-10-066.

ULTS Installation Charges. UCAN alleged that Choctaw has not provided its ULTS customers with discounted installation charges as required by Pub. Util. Code § 874(c).⁶ Choctaw denied the allegation. The Settlement states that Choctaw will comply with § 874(c).

Access to Local Directory Assistance. UCAN alleged that Choctaw has not provided its customers with access to local directory assistance as required by D.96-10-066. Choctaw denied the allegation. The Settlement states that Choctaw is in compliance with the law.

Telephone Books. UCAN alleged that Choctaw has not provided telephone books to its customers as required by D.96-10-066. Choctaw denied the allegation. The Settlement states that Choctaw will take reasonable steps to ensure that its customers receive printed directories, but that Choctaw cannot guaranty that the underlying ILEC, whose services Choctaw is reselling, will timely distribute the telephone books.

⁶ All statutory references are to the Public Utilities Code. Section 874(c) states, in relevant part, as follows: “The lifeline telephone service installation or connection charge, or both, shall not be more than 50 percent . . . [of the] installation or connection charge of the charge for basic residential service installation or connection, or both.”

Access to Toll-Free Numbers. UCAN alleged that Choctaw's tariffs limit access to 800 or 800-like toll free services in violation of D.96-10-066. Choctaw acknowledged that its tariffs indicate that access to 800 or 800-like toll free services may be limited in some circumstances, but denied that it ever limited such access. The Settlement states that Choctaw will revise its tariffs to indicate that customers have unconditional access to 800 or 800-like toll free services.

Billing Adjustment for Calls Made to 1-900 Numbers. UCAN alleged that Choctaw has not always complied with the requirement in D.96-10-066 to offer its customers a free, one-time billing adjustment for 1-900 calls that were made inadvertently, mistakenly, or were unauthorized. Choctaw disputed the allegation, claiming that there are likely to be few instances of customers incurring charges for 1-900 calls, since Choctaw blocks such calls pursuant to its Commission-approved tariff. The Settlement states that Choctaw will offer a free, one-time billing adjustment for 1-900 charges incurred by its customers.

Access to California Relay Service (CRS). UCAN alleged that Choctaw has not provided its customers with access to CRS as required by § 2881.⁷ Choctaw denied the allegation. The Settlement states that Choctaw will (1) offer access to CRS, (2) increase its customer education efforts to ensure that its customers are properly informed of this fact, and (3) include in its marketing to California consumers an 1-800 number to contact Choctaw about CRS. The Settlement also states that a caller to the 1-800 number who has a question about

⁷ CRS, which was established pursuant to § 2881, et seq., enables customers with text telephone ("TTY") devices to communicate by telephone with persons who do not use a TTY device. A TTY device uses a phone line to send and receive information in text and graphic forms. There is no extra charge to use CRS - callers only pay for the cost of the call.

CRS will be routed to appropriately trained personnel who can provide specific answers to the inquiry.

Blocking of Discretionary Services. The Settlement states that “Choctaw agrees that it will revise its service initiation process so as to ensure that customers are given an option to selectively or completely block the transfer” of the customer’s telephone number when making calls as required by the Commission’s rules on CALLER ID blocking. This issue appeared for the first time in the Settlement.

Consistency with Filed Tariffs. UCAN alleged that Choctaw service representatives have not always provided information that is consistent with Choctaw’s tariffs. Choctaw argued that such events are isolated instances. The Settlement states that Choctaw will work to educate its employees so as to ensure that statements made by its employees are consistent with its tariffs.

IV. Discussion

A. Whether to Approve the Settlement

UCAN and Choctaw have tendered an “uncontested settlement” as defined in Rule 51(f) of the Commission’s Rules of Practice and Procedure (Rule). The relevant criteria for determining if the Settlement should be approved are set forth in Rule 51.1(e), which states that a settlement must be “reasonable in light of the whole record, consistent with the law, and in the public interest.” In addition, D.92-12-019⁸ provides that an all-party settlement should be approved only if the settlement satisfies all of the following criteria:

- a. The all-party settlement commands the unanimous sponsorship of all active parties to the proceeding.

⁸ 46 CPUC 2d 538.

- b. The sponsoring parties are fairly reflective of the affected interests.
- c. No term of the settlement contravenes statutory provisions or prior Commission decisions.
- d. The settlement conveys to the Commission sufficient information to permit it to discharge its future regulatory obligations with respect to the parties and their interests.

UCAN and Choctaw state that their Settlement conforms to all of the above criteria. We agree with one exception. The one exception concerns UCAN's allegation that Choctaw has not offered MRS to all of its customers as required by D.96-10-066. Choctaw admits that it does not offer MRS to all of its customers, but asserts that it is not required to. The Settlement resolves this issue by urging the Commission to open a generic investigation into whether and how prepaid providers of local service should comply with D.96-10-066.

We find that the Settlement's resolution of the MRS issue contravenes D.96-10-066, which clearly requires Choctaw to offer MRS to all of its residential customers.⁹ Thus, Choctaw's failure to offer MRS to all of its customers is a violation of D.96-10-066, and the Settlement allows the violation to continue. Therefore, we will modify the Settlement¹⁰ to require Choctaw to file an advice letter to revise its tariffs to offer MRS to all of its customers.¹¹ Choctaw shall file the advice letter no later than 30 days from the effective date of this decision.¹²

⁹ D.96-10-066, Appendix B, Rule 4.B.9.

¹⁰ The Commission has broad, plenary power to modify a settlement to ensure that it is in the public interest and consistent with the law. (D.99-12-032, Conclusion of Law No. 2)

¹¹ Choctaw already offers MRS to its ULTS customers. (Choctaw Tariff Sheet No. 47-T.)

¹² This decision's requirement for Choctaw to offer MRS to all of its customers supercedes, as appropriate, that part of the Settlement that addresses the MRS issue. The MRS issue is

Footnote continued on next page

Pursuant to D.97-07-028, the advice letter shall become effective 40 days after it is filed.¹³ Choctaw may also file an application for a waiver of its obligation to offer MRS.¹⁴ Our suggestion that Choctaw may file such an application in no way prejudices our decision on the application.

B. Whether to Penalize Choctaw for Its Failure to Comply with D.96-10-066

Choctaw has failed to offer MRS in violation of D.96-10-066. Violations of Commission decisions are subject to monetary penalties under § 2107 and § 2108, which state as follows:

§ 2107: Any public utility which violates or fails to comply with any provision of the Constitution of this state or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars (\$500), nor more than twenty thousand dollars (\$20,000) for each offense.

2108: Every violation of the provisions of this part or of any part of any order, decision, decree, rule, direction, demand, or requirement of the commission, by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense.

addressed in the Settlement at Appendix A, page one, last full paragraph labeled "*Flat/Measured Rate Universal Lifeline Telephone Service.*" (Italics in original.)

¹³ D.98-02-028, Ordering Paragraph (OP) 4.(4). See also D.01-02-024, OP 4.(4), and GO 96-A, Sections IV.B and V.A.

¹⁴ Choctaw shall serve a copy of the application on the service list for Rulemaking 95-01-020/Investigation 95-01-021, the proceeding that resulted in D.96-10-066.

For the following reasons, we conclude that Choctaw should be fined for its failure to comply with D.96-10-066. First, any violation of Commission decisions, regardless of the circumstances, is a serious offense that should be subject to fines. Second, the imposition of a fine will help to deter future violations of Commission decisions by Choctaw and others.

To determine the size of the fine, we shall rely on the criteria adopted by the Commission in D.98-12-075. We address these criteria below.

Criterion 1: Severity of the Offense

In D.98-12-075, the Commission held that the size of a fine should be proportionate to the severity of the offense. To determine the severity of the offense, the Commission stated that it would consider the following factors:¹⁵

Physical harm: The most severe violations are those that cause physical harm to people or property, with violations that threatened such harm closely following.

Economic harm: The severity of a violation increases with (i) the level of costs imposed upon the victims of the violation, and (ii) the unlawful benefits gained by the public utility. Generally, the greater of these two amounts will be used in setting the fine. The fact that economic harm may be hard to quantify does not diminish the severity of the offense or the need for sanctions.

Harm to the Regulatory Process: A high level of severity will be accorded to violations of statutory or Commission directives, including violations of reporting or compliance requirements.

The number and scope of the violations: A single violation is less severe than multiple offenses. A widespread violation that affects a large number of consumers is a more severe offense

¹⁵ 1998 Cal. PUC LEXIS 1016, *71 - *73.

than one that is limited in scope. For a "continuing violation," § 2108 counts each day as a separate offense.

We find that Choctaw's violation of D.96-10-066, while serious, is not an especially egregious offense. This is because the violation has not caused any physical or economic harm to others, including Choctaw's customers. In addition, there is no evidence that Choctaw has significantly benefited from its unlawful conduct.

We recognize that there are two factors that suggest a large fine may be warranted. The first is our general policy of according a high level of severity to any violation of Commission decisions. The second is § 2108, which counts each day of a continuing violation as a separate offense. Here, every day that Choctaw failed to offer MRS could be considered as a separate offense subject to fine of at least \$500 pursuant to § 2107 and § 2108. However, these two factors must be weighed against other factors that indicate Choctaw's failure to offer MRS is not an especially severe offense.

Criterion 2: Conduct of the Utility

In D.98-12-075, the Commission held that the size of a fine should reflect the conduct of the utility. When assessing the conduct of the utility, the Commission stated that it would consider the following factors:¹⁶

The Utility's Actions to Prevent a Violation: Utilities are expected to take reasonable steps to ensure compliance with applicable laws and regulations. The utility's past record of compliance may be considered in assessing any penalty.

The Utility's Actions to Detect a Violation: Utilities are expected to diligently monitor their activities. Deliberate, as

¹⁶ 1998 Cal. PUC LEXIS 1016, *73 - *75.

opposed to inadvertent wrongdoing, will be considered an aggravating factor. The level and extent of management's involvement in, or tolerance of, the offense will be considered in determining the amount of any penalty.

The Utility's Actions to Disclose and Rectify a Violation:

Utilities are expected to promptly bring a violation to the Commission's attention. What constitutes "prompt" will depend on circumstances. Steps taken by a utility to promptly and cooperatively report and correct violations may be considered in assessing any penalty.

As described previously, a smaller fine may be warranted if a utility promptly brings a violation to the Commission's attention. Choctaw argues that the following statement in its application for a CPCN and its tariff provided notice that Choctaw would not be offering MRS:

The following types of calls and services may be blocked by the Company: long distance; collect calls; operator-assisted calls; third number billed calls; or any service that may be billed to the Customer's telephone number.

There is nothing in the above statement that provides explicit notice that Choctaw would not be offering MRS as required by D.96-10-066. Nor can the above statement be reasonably interpreted as providing notice that Choctaw would not be offering MRS.

Choctaw argues that the Commission should have known that Choctaw was not offering MRS, since there is no mention of MRS in Choctaw's tariffs (except in the context of ULTS). We disagree. While we wish we had discovered the omission of MRS from Choctaw's tariffs, the onus is not on the Commission to discover what Choctaw has chosen to omit. Rather, it is Choctaw's duty to inform the Commission when its tariffs omit MRS in contravention of a Commission decision.

Choctaw also states that the Commission approved Choctaw's tariff in D.98-07-028, Finding of Fact (FOF) 15, which states as follows:

As part of its application, applicant submitted a draft of its initial tariff which complied with the requirements established by the Commission.

Choctaw argues that because the Commission approved Choctaw's tariff in D.98-07-028, the Commission cannot penalize Choctaw for having adhered to its approved tariff. We disagree. FOF 15 is clearly erroneous, since Choctaw's tariffs did not comply with the requirements established by the Commission. Indeed, Choctaw bears much of responsibility for FOF 15 being erroneous, since Choctaw failed to disclose that its tariffs did not comply with Commission requirements. It would be unjust and unreasonable if Choctaw were protected from the consequences of its unlawful conduct by an erroneous finding of fact that Choctaw helped to create.

For the preceding reasons, we conclude that Choctaw failed to notify the Commission of its violation, which suggests that a large fine may be appropriate. However, Choctaw's other conduct weighs in favor of a smaller fine. First, there is no evidence that Choctaw previously failed to comply with applicable statutes and regulations. Second, Choctaw readily admits that it has not provided MRS. Finally, as discussed in more detail elsewhere in this decision, Choctaw presented plausible arguments why it reasonably believed that it could not feasibly offer MRS as required by D.96-10-066.

Criterion 3: Financial Resources of the Utility

In D.98-12-075, the Commission held that the size of a fine should reflect the financial resources of the utility. When assessing the financial resources of the utility, the Commission stated that it would consider the following factors:¹⁷

Need for Deterrence: Fines should be set at a level that deters future violations. Effective deterrence requires that the Commission recognize the financial resources of the utility in setting a fine.

Constitutional limitations on excessive fines: The Commission will adjust the size of fines to achieve the objective of deterrence, without becoming excessive, based on each utility's financial resources.

Choctaw's 1999 Annual Report filed at the Commission shows that for the 12-month period ending December 31, 1999, Choctaw had revenues of \$207,900 and a net loss of \$49,205. These figures suggest that a relatively small fine could effectively deter Choctaw from future violations of Commission decisions. However, the previously mentioned figures are for California only. Choctaw operates in several states,¹⁸ and its total revenues may be much higher. Furthermore, Choctaw is but one of the many subsidiaries of Telephone Electronic Corporation (TEC).¹⁹ Therefore, since Choctaw's California operations appear to be only a piece of a much larger business enterprise, a relatively large fine may be necessary to deter Choctaw from future violations of Commission decisions.

¹⁷ 1998 Cal. PUC LEXIS 1016, *75 - *76.

¹⁸ Choctaw's web site states that Choctaw provides prepaid local phone service in many states.

¹⁹ Choctaw's 1999 Annual Report filed at the Commission includes two organization charts of TEC and its subsidiaries. These charts show that TEC has at least 30 subsidiaries.

Criterion 4: Totality of the Circumstances

In D.98-12-075, the Commission held that a fine should be tailored to the unique facts of each case. When assessing the unique facts of each case, the Commission stated that it would consider the following factors:²⁰

The degree of wrongdoing: The Commission will review facts that tend to mitigate the degree of wrongdoing as well as facts that exacerbate the wrongdoing.

The public interest: In all cases, the harm will be evaluated from the perspective of the public interest.

The facts of this case indicate that the degree of wrongdoing is not severe, and that the public interest has not been seriously harmed by Choctaw's failure to offer MRS as required by D.96-10-066. This is because there is no evidence that Choctaw has materially benefited from its unlawful conduct, or that any party has been harmed by Choctaw's conduct.

The facts of this case also indicate that Choctaw's failure to offer MRS is not due to a wanton disregard for D.96-10-066. Rather, Choctaw has presented a plausible explanation for why it reasonably believes it cannot not offer MRS. According to Choctaw, the ILECs whose services are resold by Choctaw do not offer prepaid MRS. Consequently, there is no prepaid MRS for Choctaw to resell to its customers. In addition, Choctaw says it cannot offer MRS on a postpaid basis, since many of its customers will not pay for MRS after the fact because they are credit challenged or take service for only a short period of time.

Although Choctaw's explanation for why it has not offered MRS is plausible, we are not convinced.²¹ In our view, Choctaw could offer MRS and

²⁰ 1998 Cal. PUC LEXIS 1016, *76.

protect itself by charging a service deposit. Customers who do not pay their bill for MRS would forfeit their deposit.²² Choctaw could also adjust its price for MRS to reflect bad debt costs associated with the service. While there might be few customers for MRS because of the relatively high price that Choctaw may have to charge to adequately protect itself, this should not be an impediment to Choctaw's offering MRS as required by D.96-10-066.

Criterion 5: The Role of Precedent

In D.98-12-075, the Commission held that any decision that imposes a fine should (1) address previous decisions that involve reasonably comparable factual circumstances, and (2) explain any substantial differences in outcome.²³

There are no previous Commission decisions that involve reasonably comparable factual circumstances. However, there is a body of Commission precedent that bears on an issue relevant to this proceeding, namely, whether the Commission is required by § 2108 to impose a fine for each day of a "continuing violation." Here, Choctaw's failure to offer MRS could be considered as a "continuing violation" subject to fine of at least \$500 per day pursuant to § 2108.

In general, Commission precedent indicates that where there is a continuing violation, the Commission has discretion in deciding whether to assess a fine for each day of the violation. For example, in D.99-08-007 the Commission held that while it could find a continuing violation and assess additional fines pursuant to § 2108, the Commission is not required to do so:

²¹ We note that Choctaw already offers MRS to its ULTS customers.

²² Commission Rules limit the amount of deposit to no more than twice the estimated average monthly bill for the class of service applied for. (D.95-07-054, 60 CPUC 2d 611, 648)

²³ 1998 Cal. PUC LEXIS 1016, *77.

“[W]hile we could find a continuing violation, and assess additional fines, we will use our discretion to assess a penalty of \$ 8,000.00 for one offense -- the failure to seek approval for the transfer of the pipeline and related assets prior to the finalization of the sale. (See, e.g., *TURN v. Pacific Bell*, wherein we held that the Commission has ‘the discretion to set an appropriate penalty or to compromise an action for collection of the penalty.’ (D.94-04-057, 54 CPUC2d 122, 124 (1994).)²⁴”

In D.99-11-044, the Commission declined to apply § 2108, since the minimum fine of \$500 per day would result in a cumulative fine so large as to threaten the ability of the utility to provide service.²⁵ Other decisions where the Commission declined to assess a fine for each day of a continuing violation include the following: D.99-06-080, D.97-06-105, D.97-04-037, D.96-08-044, D.95-01-044, D.94-09-069, D.94-01-045, D.94-01-044, and D.93-03-073.

Conclusion: Setting the Fine

We previously concluded that Choctaw should be fined for its failure to provide MRS as required by D.96-10-066. The application of the criteria established by D.98-12-075 to the facts of this case indicates that a relatively small fine is warranted. In particular, Choctaw’s violation of D.96-10-066 was not a particularly severe offense, since Choctaw’s conduct was not egregious and the public interest was not significantly harmed by the Choctaw’s unlawful conduct.

Although we have authority to assess a fine for each day that Choctaw failed to offer MRS, we decline to do so, since this would result in a large fine

²⁴ D.99-08-007, *mimeo.*, p. 12.

²⁵ D.99-11-044, *mimeo.*, p. 11.

that would be grossly disproportionate to the offense.²⁶ We conclude based on the facts of this case that Choctaw should be fined \$5,000 for not offering MRS to all of its customers as required by D.96-10-066. The fine we impose today is meant to deter future violations of Commission decisions by Choctaw and others. We emphasize that the size of the fine we adopt today is tailored to the unique facts before us in this proceeding. We may impose larger fines in other proceedings if the facts so warrant.

V. Category and Need for Hearing

The Instructions to Answer (Instructions) served on the parties contained a preliminary determination that this proceeding would be categorized as Adjudicatory. The determination of category became final when no appeal was filed pursuant to Rule 6.4(a)(2).

The Instructions also provided notice that a hearing would be held unless the parties otherwise resolved the matter. UCAN and Choctaw submitted a Settlement that purports to resolve UCAN's complaint. Although we adopt the Settlement with modifications, there are no factual issues associated with the adopted modifications that require a hearing. Accordingly, we change the prior determination that an evidentiary hearing is required; we now determine that an evidentiary hearing is not required.

This decision contains a final determination that a hearing is not necessary. Therefore, pursuant to Rule 6.6, Article 2.5 no longer applies to this proceeding, except that the prohibition on ex parte communications shall continue to apply.

²⁶ Assuming Choctaw has failed to offer MRS since July 2, 1998, the effective date of D.98-07-028 (the decision that granted a CPCN to Choctaw), the minimum fine of \$500 per day for the period of July 2, 1998, through April 19, 2001, would produce a total fine of \$511,000.

VI. Pub. Util. Code § 311(g)(1)

The draft decision of ALJ Kenney was mailed to the parties in accordance with § 311(g)(1) and Rule 77.7. Choctaw filed comments on the proposed decision on April 9, 2001. There were no reply comments. Choctaw's comments have been reflected, as appropriate, in the final decision adopted by the Commission.

Findings of Fact

1. UCAN alleged in its complaint that Choctaw does not offer several types of services required by D.96-10-066, including MRS.
2. Choctaw claims that it is not required by D.96-10-066 to offer MRS.
3. Choctaw's tariffs show that it currently offers MRS to its ULTS customers, but not to its other customers.
4. UCAN and Choctaw filed a Settlement that purports to resolve UCAN's complaint. To resolve the MRS issue raised in UCAN's complaint, the Settlement recommends that the Commission open a proceeding to consider whether and how prepaid providers of local service should comply with D.96-10-066.
5. It is feasible for Choctaw to offer MRS by (i) charging a deposit for the service that customers would forfeit upon nonpayment of MRS rates and charges; and (ii) adjusting the price of MRS to reflect bad-debt costs associated with the service.
6. There is no evidence that Choctaw's failure to offer MRS has caused any physical or economic harm to Choctaw's customers or others.
7. There is no evidence that Choctaw has significantly benefited from its failure to offer MRS.

Conclusions of Law

1. Choctaw is required by D.96-10-066 to offer MRS to all of its customers.

2. Choctaw's failure to offer MRS to all of its customers violates D.96-10-066.
3. Pursuant to § 2107, Choctaw may be fined for violating D.96-10-066.
4. The Commission has discretion to devise a monetary penalty that advances the public interest. The Commission may decline to assess a fine for each day of a continuing violation if doing so advances the public interest.
5. It is necessary and reasonable to fine Choctaw for violating D.96-10-066 in order to deter future violations of Commission decisions by Choctaw and others. The amount of the fine should be based on the criteria set forth in D.98-12-075.
6. The application of the criteria in D.98-12-075 to the facts of this case indicates that it is reasonable to fine Choctaw \$5,000 for its failure to offer MRS to all of its customers as required by D.96-10-066.
7. The Settlement's resolution of the MRS issue contravenes D.96-10-066, which requires Choctaw to offer MRS to all of its residential customers.
8. The Commission has broad, plenary power to modify a settlement to ensure that it is in the public interest and consistent with the law.
9. To ensure that the Settlement is consistent with the law, it should be modified to require Choctaw to file an advice letter to offer MRS. The advice letter should be filed no later than 30 days after the effective date of this decision.
10. To ensure that the Settlement is in the public interest, it should be modified to require Choctaw to pay a fine of \$5,000 for its failure to offer MRS to all of its customers as required by D.96-10-066.
11. The Settlement, with the modifications described in the two previous Conclusions of Law, is reasonable in light of the whole record, consistent with law, and in the public interest.
12. The Settlement, as modified by this decision, should be approved.
13. No evidentiary hearing is required in this matter.

14. This decision should be effective immediately, so that the modified Settlement may be implemented expeditiously.

O R D E R

IT IS ORDERED that:

1. The Settlement Agreement contained in Appendix A of this decision is adopted with the following two modifications:
 - a. Choctaw Communications, Inc., d/b/a Smoke Signal Communications (Choctaw), shall file an advice letter to offer measured rate local telephone service (MRS) as required by Decision (D.) 96-10-066. Choctaw shall file the advice letter no later than 30 days after the effective date of this decision.
 - b. Pursuant to Pub. Util. Code § 2107, Choctaw shall pay a fine of \$5,000 for its failure to offer MRS to all of its customers as required by D.96-10-066. Choctaw shall pay the fine by tendering to the Commission's Fiscal Office a check for \$5,000 made payable to the State of California General Fund.
2. Case 00-04-039 is closed.

This order is effective today.

Dated April 19, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

Commissioner Henry M. Duque, being necessarily absent, did not participate.

Appendix A
SETTLEMENT AGREEMENT

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Utility Consumers' Action Network,)	
Complainant)	
)	
v.)	C. 00-04-039
)	
Choctaw Communications, Inc.)	
D/b/a Smoke Signals Communications)	
Defendant)	
_____)	

SETTLEMENT AGREEMENT**I. PARTIES**

The parties to this Settlement Agreement ("Settlement Agreement") are The Utility Consumers' Action Network ("UCAN") and Choctaw Communications, Inc. ("Choctaw"), hereinafter referred to collectively as the "Settling Parties".

II. RECITALS**A. SCOPE AND DESCRIPTION OF THE AGREEMENT**

1. UCAN filed its Complaint ("Complaint") at the California Public Utilities Commission ("Commission") on April 27, 2000, alleging, among other things, that Choctaw Communications was not in compliance with its tariffs that were filed at the CPUC and that the tariffs that were filed did not comport with the law. (All issues raised by UCAN in the Complaint or in its Pre-hearing Conference Statement or in this Settlement Agreement are hereinafter referred to as "Complaint Issues")
2. The Settling Parties agree to resolve the Complaint Issues in the manner set forth below. The resolved issues are interrelated and no issue or term of the Settlement Agreement should be evaluated in isolation from the remainder of the settlement. (See Section III.G, Indivisibility, below). Each Settling Party urges the Commission to approve this Settlement Agreement as a fair and reasonable resolution of the Complaint Issues. Each Settling Party hereby declares and represents that it has reached this determination, and is executing this Settlement Agreement, after consultation with its own legal counsel. The undersigned parties recommend that the Commission adopt the terms of the agreement set forth below.

B. UCAN'S PRESENTATION

UCAN is a San Diego-based ratepayer advocacy group that represents over 40,000 members, some of whom were Smoke Signals customers. UCAN reviewed the tariffs of Choctaw Communications, it spoke to customers of Choctaw and conducted pretext phone calls to

document the representations made by Choctaw's customer service representatives. It has conducted formal discovery and provided its view of the evidence to Choctaw.

C. CHOCTAW'S PRESENTATION

Choctaw Communications Inc. does business as Smoke Signals Communications®. It responded to UCAN's complaint, provided numerous documents to UCAN in response to discovery requests, and provided its view of the evidence to UCAN.

D. SETTLEMENT NEGOTIATION PROCESS

Shortly after the September 15th, prehearing conference, the Settling Parties met and developed a set of factual agreements which led to the settlement attached below.

III. AGREEMENT

For the purposes of settlement, the Settling Parties agree as follows:

A. EFFECTIVE DATE

This Settlement Agreement shall become effective as of the date ("Effective Date") that the Commission's decision approving this Agreement becomes final and non-appealable.

B. RECITALS INCORPORATED INTO AGREEMENT

The Recitals set forth above are an integral part of this Settlement Agreement and are incorporated herein as part of the Agreement.

C. GENERAL AGREEMENT

To avoid substantial litigation and discovery costs and without admission of liability, the Settling Parties have compared their data and arrived at findings that permit settlement. The details of this settlement are set forth in Appendix "A".

D. OBLIGATION TO PROMOTE APPROVAL

1. The Settling Parties agree to use their best efforts to propose, support and advocate approval and adoption of this Settlement Agreement by the Commission. The Settling Parties agree to perform diligently, and in good faith, all actions required or implied hereunder, including, but not necessarily limited to, the execution of any other documents required to effectuate the terms of this Settlement Agreement, and the preparation of exhibits for, and presentation of witnesses at, any required hearings to obtain the approval and adoption of this Settlement Agreement by the Commission. No party to this Settlement Agreement will contest any aspect of this Settlement Agreement in any proceeding or in any other forum, by contact or communication, whether written or oral (including ex parte communications whether or not reportable under the Commission's Rule of Practice and Procedure) or in any other manner before this Commission.

2. The Settling Parties agree to actively and mutually defend this settlement if its approval or adoption is opposed by any person or entity. The Settling Parties understand and acknowledge that time is of essence in obtaining the Commission's approval of this Settlement Agreement and that each will exercise its best efforts to insure the approval and adoption of this Settlement Agreement.

E. PUBLIC INTEREST

The Settling Parties agree jointly by executing and submitting this Settlement Agreement that the relief requested herein is just, fair and reasonable, and in the public interest. They believe that the Commission can reasonably find that this settlement complies with a public interest test.

F. RESOLUTION OF COMPLAINT ISSUES

This Settlement Agreement resolves all claims arising out of the Complaint Issues. Each Settling Party expressly reserves its right to advocate, in future proceedings, principles, assumptions, arguments and methodologies which may be different than those underlying this Settlement Agreement.

G. INDIVISIBILITY

1. No individual term of this Settlement Agreement is assented to by any party except in consideration of the Settling Parties' assents to all other terms. Thus, the Settlement Agreement is indivisible and each part is interdependent on each and all other parts.
2. Any party may withdraw from this Settlement Agreement if the Commission modifies, deletes from, or adds to the disposition of the matters stipulated herein. The Settling Parties agree, however, to negotiate in good faith with regard to any Commission-ordered changes in order to restore the balance of benefits and burdens, and to exercise the right to withdraw only if such negotiations are unsuccessful.

H. GOVERNING LAW

This Settlement Agreement shall be governed by the laws of the State of California (without regard to conflicts of law principles) as to all matters, including, but not limited to, matters of validity, construction, effect, performance and remedies.

I. NO THIRD-PARTY BENEFICIARIES

Nothing in this Settlement Agreement shall be construed to create rights in, or to grant remedies to, any third party as a beneficiary of this Agreement.

J. INTERPRETATION

The section headings contained in this Settlement Agreement are solely for the purpose of reference, are not part of the agreement of the Settling Parties, and shall not in any way affect the meaning or interpretation of this Settlement Agreement. All references in this Settlement Agreement to Sections are to Sections of this Settlement Agreement unless otherwise indicated. Each of the Settling Parties hereto and their respective counsel have contributed to the preparation of this Settlement Agreement. Accordingly, no provision of this Settlement

Agreement shall be construed against any Party because that Party or its counsel drafted the provision.

K. RELATED PARTIES

This Agreement shall be binding upon and inure to the benefit of the parties, their respective assigns, successors, and subsidiaries and their respective officers, directors, employees and agents. Furthermore, the agreement will be binding on and inure to the benefit of any affiliate of Choctaw that offers or in the future offers prepaid local phone service in California. Choctaw currently has no such affiliates operating in California. An "affiliate" is an entity that controls Choctaw, is controlled by Choctaw, or is under common control with Choctaw.

L. NO WAIVER

It is understood and agreed that no failure or delay by any Party hereto in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or future exercise thereof or the exercise of any other right, power or privilege.

M. RELEASE

It is the intent of the parties that this Settlement Agreement resolve not only this proceeding but the underlying Complaint Issues themselves, so as, for example, to preclude the filing by UCAN of a similar suit in court based upon on the Complaint Issues. Accordingly, UCAN hereby releases Choctaw, its assigns, successors, subsidiaries and their respective officers, directors, employees and agents from any and all claims for monetary relief concerning the Complaint Issues. This Release, however, does not preclude UCAN from seeking attorneys' fees and other compensation pursuant to California Public Utility Code Sec. 1801, et seq., nor does it preclude Choctaw from objecting on any ground to a request for such compensation or the amount of compensation requested. The Settling Parties acknowledge that the terms of this Agreement resolve claims for non-monetary relief concerning the Complaint Issues.

N. AMENDMENT; INTEGRATION

This Settlement Agreement sets forth the entire understanding and agreement between the parties with reference to the subject matter hereof, and this Settlement Agreement may not be modified or terminated except by an instrument in writing signed by all Settling Parties hereto. This Settlement Agreement supersedes all prior agreements, negotiations, and understandings among the Settling Parties, both oral and written related to this matter.

O. COUNTERPARTS

This Settlement Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

P. APPENDICES

The appendices to the agreement are: Appendix A.

Q. NOTICES

All notices under this Agreement shall be delivered by facsimile or nationally-recognized overnight courier to the following:

If to UCAN:

Michael Shames
Attorney at Law
Utility Consumers' Action Network
1717 Kettner Blvd., Suite 105
San Diego, CA 92101
(619) 696-6966
Fax: (619) 696-7477

If to Choctaw

Seth Block
Senior Vice President
Choctaw Communications Inc.
8700 S. Gessner
Houston, TX 77074
713 – 779-0692 x3267
Fax: 713 – 541-5980

with copy (which shall not constitute notice) to

James U. Troup
James H. Lister
Suite 4001 K, 1801 K Street, NW
Washington, DC 20006
(202) 775-7100
Fax: (202) 857-0172

EXECUTION

In witness whereof, intending to be legally bound, the Signatories hereto have duly executed this Settlement Agreement on December _____, 2000, on behalf of the parties they represent.

By: /s/ MICHAEL SHAMES

Michael Shames
Attorney at Law
Utility Consumers' Action Network
1717 Kettner Blvd., Suite 105
San Diego, CA 92101
(619) 696-6966
Fax: (619) 696-7477
Mshames@ucan.org

By: /s/ SETH BLOCK

Seth Block
Senior Vice President
Choctaw Communications Inc.
8700 S. Gessner
Houston, TX 77074
713 – 779-0692 x3267
Fax: 713 – 541-5980

APPENDIX A

Disputed Issues

UCAN's complaint is predicated upon the upon 68 CPUC 2d 524 (1996) D.96-10-066, (Re Universal Service and Compliance with the Mandates of Assembly Bill 3643) which dictates that carriers providing local exchange residential service shall, at a minimum, provide certain elements of basic service. In its complaint, UCAN alleged, among other things, that Choctaw Communications d/b/a Smoke Signals was not offering the following:

1. Flat and Measured Universal Lifeline Telephone Service
2. Discounted ULTS Installation Charges
3. Access to local directory assistance and local directories
4. Complete access to toll-free 800 service
5. Free billing adjustments
6. Access to telephone relay services.
7. Providing blocking of discretionary services.
8. Terms of service consistent with their filed tariffs.

These eight items, a subset of the Complaint Issues, shall be referred to as the "Disputed Issues".

Resolution of Disputed Issues

The Settling Parties have agreed to the following specific resolution of each of these matters as described below.

1. *Flat/Measured Rate Universal Lifeline Telephone Service.* Settling Parties agree that a pending decision in R. 98-09-005 will resolve the issue of whether Choctaw is obligated to provide universal lifeline service to its customers. This matter need not be resolved in this case. However, the Parties agree that some of the other matters resolved in this case warrant examination by the Commission, as they may impose undue hardships upon pre-paid service companies. Thus they agree to urge the Commission to initiate a generic Investigation into whether and how Pre-paid Phone service providers are to comply with D.96-10-066.
2. *ULTS Installation Charges.* UCAN contends that Choctaw has not complied with Public Utilities Code § 874(c). Choctaw disputes this allegation. Settling Parties agree that Choctaw will comply with Public Utilities Code § 874(c) which

states that: "The lifeline telephone service installation or connection charge, or both, shall not be more than 50 percent . . . installation or connection charge of the charge for basic residential service installation or connection, or both."

3. *Access to local directory assistance and timely access to directories.* Settling Parties agree that Choctaw is in compliance with the law because access to third party directory assistance is not blocked and this service element (or lack of) was approved by the PUC upon filing of defendants' tariffs. UCAN contends that Choctaw has not ensured that its customers receive telephone books within three months of signing up for service. Choctaw disputes this allegation. Choctaw will take all reasonable steps within its control to ensure that customers receive printed directories within three months after telephone service is initiated, although it cannot guaranty that underlying ILEC whose services Choctaw is reselling will timely distribute the telephone books.
4. *Free access to 800 or 800-like toll free services.* UCAN contends that Choctaw has imposed a "where available" restriction on access 800 or 800-like toll free services. Choctaw acknowledges that the "where available" language appears in its tariff but disputes any allegation that access to 800 or 800-like toll free services has in fact been limited. Choctaw agrees that it will revise its Tariff Sheet 43-T of May 2000 which states "Where available, place or receive calls to 800 telephone numbers." The "Where available" will be removed to clarify that customers are offered unconditional access to 800 or 800-like toll free services.
5. *One-time billing adjustment for charges incurred inadvertently, mistakenly, or that were unauthorized.* UCAN contends that Choctaw has not always provided one-time billing adjustment for charges incurred inadvertently, mistakenly, or that were unauthorized. Choctaw disputes this allegation, and note that as Choctaw's service is prepaid by the person responsible for paying charges and calls to 1-900 numbers are blocked, there are likely to be few instances in which a customer incurs a charge inadvertently, mistakenly, or without authorization. Choctaw clarifies this matter by committing that it will offer free one-time billing adjustments for charged incurred by customers pursuant to state rules.
6. *Whether defendant offers access to telephone relay service as provided for in PU Code Sec. 2881.* UCAN contends that Choctaw has not offered TRS services, and Choctaw disputes this allegation. Choctaw commits that it does offer TRS service, and will increase its customer education efforts so as to ensure that customers are properly informed of this fact. Marketing to California consumers contains a specific 1-800 number in order to contact Choctaw. A caller to this number who has a question about TRS is routed to the appropriately trained personnel who can provide specific answers to the inquiry.
7. *Providing blocking of discretionary services.* Choctaw agrees that it will revise its service initiation processes so as to ensure that customers are given an option to selectively or completely block the transfer of CNIP information, consistent with the Commission's rules on CALLER ID blocking. Because Choctaw is a reseller, this requirement is not intended to set a strict liability standard.

8. *Consistency of Defendants' practices with their filed tariffs.* As a result of interviews with customers and its pretext calling, UCAN has alleged that there have been several instances in which customer service representatives provided information that did not accurately reflect Choctaw's tariff. Choctaw contends that any such events are isolated incidents. UCAN has provided Choctaw with its findings and the company has committed to conduct further customer service education programs so as to ensure that statements by its employees are accurate and consistent with its tariffs.

NOTICE & OPPORTUNITY TO CURE

The procedure stated in this paragraph shall apply starting 60 days after execution of this agreement, as during that 60 day period Choctaw (if it has not already done so) will take the actions agreed upon in this Agreement. Should UCAN contend that Choctaw has acted contrary to promises made in this Agreement (whether before or after approval of this Agreement by the Commission), it shall provide Choctaw with a confidential written notice specifying the circumstances and date(s) of the alleged deficiency. Choctaw shall have twenty (20) calendar days to cure the deficiency on a going forward basis and provide a confidential written report describing remedial actions taken. If Choctaw cures the deficiency and provides the report, no further action shall be taken unless, except as stated below. If UCAN is not presented with adequate evidence that the cure has been accomplished (or if UCAN had previously issued two or more notices concerning the same deficiency alleged in the current notice), UCAN shall call a meeting of the parties to be held in person or by teleconference on a mutually agreeable date within ten (10) days of the delivery of the written report describing the cure. During this meeting and for at least ten (10) days thereafter the parties shall negotiate in good faith to resolve the alleged deficiency. This procedure shall be a prerequisite to the filing of any action before any state, local or federal court or administrative agency (or the filing of an enforcement motion or similar request in this proceeding, if it is not yet closed.)